Supreme Court, U.S.
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No. 01-1231

In the

Supreme Court of the United States

Connecticut Dept. of Public Safety, et al.,
Petitioners,
v.
John Doe, et al.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

LUCY A. DALGLISH, ESQ.
Counsel of Record
GREGG P. LESLIE, ESQ.
ASHLEY GAUTHIER, ESQ.
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1815 N. Fort Myer Dr., Suite 900
Arlington, Virginia 22209
(703) 807-2100

15 pp

Motion for Leave to File *Amicus Curiae* Brief of The Reporters Committee for Freedom of the Press

Pursuant to Supreme Court Rule 37.2(b), The Reporters Committee for Freedom of the Press moves this Honorable Court for leave to file an *amicus curiae* brief in support of the Petitioners. The brief *amicus curiae* follows this motion.

The Reporters Committee has requested the consent of counsel to file a brief *amicus curiae*; however, it has not received any letters of consent from counsel. Shelley Sadin, Esq., counsel for one of the Respondents, gave consent by telephone, but *amicus* has not yet received a verification letter from her. Attorneys for the other Respondent and for Petitioners did not return telephone calls seeking consent.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Amicus is concerned with a subsidiary issue in this case: specifically, whether the dissemination of information can be restricted unless there is "proof" that the dissemination is necessary to protect public safety. The Second Circuit's ruling in this case is troubling because it implies that truthful information about convicted sex offenders should not be disseminated unless there is a showing that dissemination is necessary. *Amicus* is concerned that the Second Circuit's interpretation of the law could result in overbroad restrictions on the dissemination of truthful information.

Given the ramifications of a decision in this area for First Amendment and access interests, *amicus curiae* respectfully request that this Court grant it leave to file the attached brief.

Lucy A. Dalglish, Esq.
Counsel of Record for
Amicus Curiae
Gregg P. Leslie, Esq.
Ashley Gauthier, Esq.
The Reporters Committee
for Freedom of the Press
1815 N. Fort Myer Drive, Suite 900
Arlington, Virginia 22209

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INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee has a strong interest in the First Amendment and access issues raised by this case. The Second U.S. Circuit Court of Appeals has ruled that a convicted felon is entitled to a hearing on his potential to commit future crimes before truthful information about the felon and his conviction can be disseminated. Placing restrictions on the dissemination of truthful information about those who have been convicted of crimes infringes on the First Amendment rights of the public and press, and limits the ability of the public to oversee the workings of its government. The appellate court's ruling is troublesome for an additional reason: it implies that there must be a showing of need before truthful information can be disseminated. The Reporters Committee strongly opposes any rule that requires evidence of necessity before truthful information may be disseminated. Finally, the Reporters Committee is troubled by any interpretation that would suggest that listing true information about criminal convictions could be defamatory.

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief. A motion for leave to file this brief was filed pursuant to Supreme Court Rule 37.2(b).

SUMMARY OF ARGUMENT

The Second Circuit erred in finding that due process protections must apply before the government may disseminate truthful information about a convicted criminal and his conviction. The dissemination of truthful information about a convicted criminal and his conviction should not be prohibited because it is "defamatory" or "derogatory." All of the information contained in the public registry is true. No allegations about character or behavior are implied merely by making a truthful statement about a past conviction.

The assertion that a person is "currently dangerous" cannot be proven true or false because such a determination would require knowledge of the person's future acts. It would be far more defamatory for the government to label persons as "future felons" than to merely list truthful information about past convictions. As a matter of policy, true information cannot be the basis of a defamation claim, regardless of whether the speaker is the government or a private entity.

ARGUMENT

I. The publication of truthful information about a conviction does not lead to a defamatory implication as a matter of law.

This case involves a constitutional challenge to a state's dissemination of true information about convicted sex offenders and the crimes for which they were convicted. The sex offenders have argued that their due process rights are violated because the government sex offender listings are a form of government defamation and the requirements of the registry law put their rights at risk. However, the sex

offender registries list only true information and no further allegations against the offenders are implied merely by disseminating this information.

In this case, the Second Circuit ruled that convicted sex offenders were entitled to a hearing to determine "whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry" of convicted sex offenders. *Doe v. Dept. of Public Safety*, 271 F.3d 38, 62 (2d Cir. 2001).

The court had considered the constitutionality of Connecticut's "Megan's Law," a law that requires certain convicted sex offenders to register with the state. The law also mandates that certain registry information, such as a convicted felon's name, address and conviction information, be disseminated by printed materials and an internet website. *Id.* at 41.

The court found that by including convicted sex offenders in a registry and disseminating the conviction information, the state "branded" such persons as "currently dangerous offenders." *Id.* at 41-42. The court made such a conclusion despite an explicit statement on the state website to the contrary. The website stated:

> The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.

Id. at 44.

The court reasoned that Due Process protections are required in cases of "governmental defamation" if (1) the government makes a statement that is sufficiently derogatory to injure a person's reputation, that is capable of being proved false, and that the person claims is false, and (2) there is some tangible and material burden or alteration of the person's status or right. *Id.* at 47 (*citing Paul v. Davis*, 424 U.S. 693 (1976)).

Amicus does not dispute that the *Paul* case sets forth the appropriate legal test. However, *amicus* disagrees with the Second Circuit's application of the test to the dissemination of information in sex offender registries.

The information contained in sex offender registries is not false information, nor does it consist of mere accusations. It was conceded at the appellate court that the information actually listed in the Connecticut registry was accurrate conviction information.

In numerous cases, convicted criminals have brought libel claims against those who have disseminated accurrate information about the conviction. Courts have consistently dismissed such claims, finding that the information disseminated is true and therefore may not be the basis for a defamation claim. *See, Schaefer v. Newton*, 57 F.3d 1073 (7th Cir. 1995) (convicted murderer could not sustain libel action against author for calling him a killer because statement is true, based on conviction); *Bukowski v. Hall*, 165 F. Supp. 2d 674 (N.D. Ohio 2001) (man convicted of sexual assault cannot maintain defamation suit against his victim because allegation was true, based on conviction: "The Court finds that without evidence of a reversal of the defendant's earlier conviction, no reasonable jury could conclude that the [woman's] statements were false");

Zandford v. Nat'l Assoc. of Securities Dealers, Inc., 19 F. Supp. 2d 1 (D. D.C. 1998) (person convicted of wire fraud cannot maintain libel action); *Jones v. Globe Int'l, Inc.*, 1995 WL 819177 (D. Conn. 1995) (person convicted of burglary cannot maintain libel action based on facts found true in criminal trial); *Velasquez-Campuzano v. Marfa Nat'l Bank*, 896 F. Supp. 1415 (W.D. Tex 1995) (true information reported about a crime cannot be basis for defamation claim).

In at least one case, a plaintiff who had been convicted of cheating by a university court argued that he was defamed by "the negative stigmatism associated with an honor conviction." *Cobb v. The Rector and Visitors of University of Virginia*, 69 F. Supp. 2d 815, 833 (W.D. Va. 1999). Such an argument is most closely analogous to the plaintiffs' claims in the present case that they are injured by the stigma resulting from their conviction, not that the information about the conviction is false. In the *Cobb* case, however, the court correctly noted that, although a person's reputation may be tarnished by a conviction, the fact of conviction is not false. The court also found that, as a matter of law, one cannot be defamed by the attitude others may take as a result of one's conviction. *Id.* The court stated:

> [T]he plaintiffs' . . . allegations — the Honor Committee's attitude that it is incapable of error and the negative stigmatism associated with an honor conviction — do not state a claim for defamation as a matter of law. . . . In addition, the plaintiffs' stigmatization theory fails as a defamation claim because it relies on their assertion that Cobb was wrongfully convicted of an honor violation. However, the conviction was based on a constitutional procedure and supported by adequate

> circumstantial evidence. . . . As such, the central element of a defamation claim, requiring a publication to be false, is not satisfied.

Id. at 833-34.

The plaintiff in this case makes an argument similar to the plaintiff's argument in *Cobb*. Plaintiff here contends that the "false" statement is the implication that he is presently dangerous. *Doe*, 271 F.3d at 48. However, the government has never made the assertion that Doe (or any other particular convicted sex offender) is presently dangerous. To the contrary, the government explicitly stated that it made no assessment as to whether any particular offender was dangerous.

The Second Circuit claimed that "the registry implies that each person listed is more likely than the average person to be currently dangerous" and that such an implication is stigmatizing. *Id.* at 49.

Amicus takes issue with such an interpretation. The registry lists the identities of persons who have been convicted of certain crimes. It is strictly a compilation of factual information for the purposes of public access to information. The registry, in itself, does not imply anything.

Our legal system specifically recognizes that the fact of a prior conviction cannot be used as evidence of a present or future crime. *See* Fed. Rules of Evidence 404 ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.") The rule of evidence was adopted because our government understood that the fact that a person has committed a crime in the past does not mean that they will commit another crime.

Such official recognition should be applied in the

present case. Although a citizen may use government records to research information about persons who have been convicted of sex offenses, the government does not thereby "stigmatize" the convicted criminal by suggesting that he is "currently dangerous." Providing access to conviction information does not imply that the person is "currently dangerous," because our legal system recognizes that there is no necessary connection between past and present conduct. Such a common sense rule should not be circumvented in this case, and a plaintiff should not be permitted to create "stigma" merely because he subjectively feels stigmatized.

In a recent Second Circuit case, the court recognized that the government publication of truthful information about a criminal conviction is <u>not</u> defamatory and does not affect any interest raising due process rights. *Wells v. Goord*, 29 Fed. Appx. 693, 2002 WL 24314 (2d Cir. 2002) (*unpublished opinion*). In *Wells*, a prison inmate convicted of robbery brought a Section 1983 claim against the Commissioner of Corrections, alleging that he was defamed by the government and his due process rights were violated because the Department of Corrections website listed information about his conviction. The Second Circuit found that the inmate was not entitled to notice and an opportunity to be heard before the government labeled him a "convicted robber" because he had, in fact, been convicted of robbery, thereby making the website's statement true. *Id.*

The Second Circuit should have applied the same reasoning in this case. The only statement made by the government is the factual listing of information about Plaintiff and his conviction. The information listed is true and therefore should not invoke any due process rights before the information may be disseminated.

II. The alleged assertion that a person is "currently dangerous" is not capable of being proven true or false.

The Second Circuit asserted that a registry implies that a convicted felon is "currently dangerous" and found that such an implication was defamatory. Part of the *Paul* test requires that an alleged defamatory statement be capable of being proved true or false. The most puzzling part of the Second Circuit's decision in this case is the court's determination that it is possible to prove true or false the issue of whether a particular person is "currently dangerous."

Amicus disputes that the sex offender registry implies that a person is "currently dangerous." But even assuming, *arguendo*, that such an implication was made, it cannot be proven true or false at any given time.

Presumably, by the term "currently dangerous," the court is referring to whether the felon is likely to commit a crime in the reasonably forseeable future, as opposed to the past or immediate present. However, it is not possible to determine whether such a statement is true or false until the person commits or does not commit a crime. But since there is always the possibility that he may commit a crime in the future (which is unknowable), such a statement is incapable of being proved true or false.

The Second Circuit's proposal is far more damaging to the plaintiff than the state's registry is. The state merely wishes to list truthful information about past convictions. The Second Circuit proposes to have the government explicitly label people as "currently dangerous," which may turn out to be false. It would raise far more of a stigma for a court or court-appointed "expert" to hold a hearing, make a determination and label a person as "currently dangerous."

With such a determination, the person becomes clearly stigmatized with a government-stamped warning. And, if the person does not commit any additional crimes, would he (or his estate) have a civil rights suit against the person who falsely labeled him "currently dangerous?"

Notably, the Second Circuit stated that it took no position on the form of the required hearing. It is difficult to imagine how any judge or other "expert" could determine whether a person will commit a crime in the future.

In essence, the Second Circuit is asking judges to label people as "future felons." Such a stigma would be far more problematic than listing truthful information about past convictions.

III. If due process protections apply, they should apply prior to registration.

The Second Circuit ruled that sex offenders were entitled to due process hearings before information about their convictions was disseminated to the public. However, if this Court finds that convicted sex offenders are entitled to notice and an opportunity to be heard, then such protections should apply before they are required to register with the state. It makes little sense to rule that sex offenders must register but that the information can't be released without a hearing.

For example, in *Doe v. Pryor*, 61 F. Supp. 2d 1224 (M.D. Ala. 1999), the court found that a man convicted of a federal sex offense was entitled to a hearing prior to registration under Alabama sex offender registry law to determine whether his federal conviction was equivalent to a sex offense in Alabama. In essence, the court found that due process protections applied to determine whether he

had to comply with the law at all, but if the law applied to him, then the information could be included in the registry.

Amicus opposes a rule that requires offenders to register, but requires proof of necessity (i.e. proof of "dangerousness") before the information about the offender may be released. Such a rule would interfere with the public's ability to examine how the government is administering its laws. Furthermore, it would render the registry ineffective and pointless.

CONCLUSION

Amicus respectfully requests that this Court find that due process protections are not required before the government may disseminate truthful information about a convicted criminal and his conviction.

Respectfully submitted,

Lucy Dalglish, Esq.
Counsel of Record
Gregg P. Leslie, Esq.
Ashley Gauthier, Esq.
The Reporters Committee for
Freedom of the Press
1815 N. Fort Myer Dr., Suite 900
Arlington, VA 22209
(703) 807-2100

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